

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

11,151

PL-1

[Protest Involving Bid Rejection]

FILEB-194495

DATE: August 17, 1979

MATTER OF Virginia Refrigeration, Inc.

DIGEST:

1. Submission by low bidder, which had inadvertently discarded invitation forms, of signed invitation cover sheet (Standard Form 33) with bid and acknowledgment of three invitation amendments obligated bidder to comply with terms and conditions of invitation and, consequently, fact that invitation pages containing terms and conditions were not also returned with bid does not render bid nonresponsive.
2. Low bid was not nonresponsive for failure of bidder to bid on conforming items even though two brand name model numbers of items offered by bidder were not designated in invitation, since models offered were in essence same brand name items called for in invitation and met all intended salient characteristics.
3. Bid should not have been rejected due to brand name supplier's list of equipment (submitted by low bidder with bid) which included statements that supplier did not intend to supply bidder with certain nonbrand name valves, because statements did not relieve bidder of obligation to supply Government with valves.
4. Although bid of awardee was at best ambiguous as to whether brand names were intended to be supplied and, therefore, was nonresponsive, substantial contract performance precludes any recommendation of remedial action. Further, agency improperly requested and accepted post-bid-opening clarification that brand names were to be supplied.

Contract performance
206173

Equipment contracts
Bidder responsiveness
Invitation for bids
Bid specifications
Solicitation specifications

Koldane
DLB 02593

DLB 02592

Virginia Refrigeration, Inc. (Virginia), protests the rejection of its low bid of \$635,572.20 under Tyndall Air Force Base (Tyndall) invitation for bids No. FO8637-79-B-00006, a portion of which called for brand name or equal items. ABC 00 894

The contracting officer rejected the Virginia bid as nonresponsive for basically three reasons. First, Virginia used a bid form other than that provided by the contracting activity without including a statement with its bid that it would comply with all the terms and conditions set forth in the invitation. Second, certain of the equipment offered by Virginia did not conform to the specifications. More specifically, the Virginia bid was premised on the supplying of a Hobart model No. 3SLR blast freezer rather than the required Hobart model No. 3SLFR and Cumberland Corp. model No. 9007 racks (electroplated zinc) instead of the required Cumberland Corp. model No. 9056 (stainless steel). Third, Virginia indicated in its bid that it was not furnishing or installing certain equipment (valves) required by the specifications. Award was made to the second low bidder, Koldaire Inc., at \$635,855.

Virginia contests the finding of nonresponsiveness. It notes that it was informed by the contracting officer that it could submit a bid on invitation forms other than those supplied by the contracting activity (Virginia had inadvertently discarded these) if it also submitted a statement that it was bidding according to the pertinent drawings and specifications. Accordingly, Virginia promised in its bid to:

"Furnish and install refrigeration Display, Prefabricated walk-in refrigerator, refrigeration equipment and related mechanical and electrical in accordance with drawings and specifications in Section M. of Sol. No. FO8637-79-B-00006."

As concerns the failure to specifically promise to supply valves, Virginia notes that it would be bound under the specifications and drawings to supply these nonbrand name valves during equipment installation.

For the following reasons, we believe that the Virginia bid was improperly rejected.

First, with its bid, Virginia submitted "Solicitation, Offer, and Award" cover sheet (Standard Form 33) (albeit not the exact page supplied it by Tyndall) whereon Virginia properly identified the invitation number and the issuing activity. The "Table of Contents" set forth on that cover sheet enumerated the same invitation sections as those in the invitation issued by Tyndall. The cover sheet was signed by a Virginia officer, and obligated Virginia (as stated on the cover sheet) "in compliance with the above * * * to furnish any or all items upon which prices are offered * * * delivered at the designated point(s), within the time specified in the Schedule." Virginia further acknowledged receipt of all three of the amendments issued to the invitation. We have held that, even though a bidder may not return all the pages of an invitation with its bid, by signing and submitting such a cover sheet a bidder obligates itself to meet all the terms and conditions of the invitation and has submitted an acceptable bid. 49 Comp. Gen. 538 (1970); International Harvester Company, 58 Comp. Gen. 409 (1979), 79-1 CPD 259.

Second, we are now advised by the issuing activity that there are no differences between the salient characteristics of the Hobart model Nos. 3SLR and 3SLFR. In this regard, we observe that the specifications were not changed by the activity when it amended the invitation to change the model number. Hobart merely discontinued the use of the model No. 3SLR designation and substituted the 3SLFR designation for its presently produced item. We are further advised that the specification requirement that the Cumberland Corp. racks be constructed of stainless steel is incorrect, and that model No. 9056, which has been replaced by a new and equal/superior model No. 9007, is constructed of electroplated zinc which was the intention and desire of the activity. In view of the above, we cannot say that Virginia offered items that did not conform to the specifications.

Third, we will consider the valve issue which involves the cover letter and the supplier quote attached to it in the Virginia bid wherein the brand name items were listed. After listing several brand names and model

numbers the cover letter reads "Remainder of items are furnished by Tyler Refrigeration Corp. See attached list." The "attached list" consisted of an enumeration by invitation item of the brand name items in the invitation and certain components of those items. The end of the Tyler list consisted of certain items separate and apart from the brand name items (for example, remote condensers, valves, unit coolers). Included in this listing were statements that:

"*We are not furnishing suction line hand shut-off valves (all cases & evaporators)
Net uninstalled for each valve add 19.60.
77 Total Required.

* * * * *

"*No 3-Valve by pass on coils or cases."


The contracting officer believes that these statements show that these valves would not be furnished. However, we agree with Virginia that it is bound to supply the nonbrand name valves, which the protester alleges are not manufactured by Tyler, during installation. In this regard, that portion of the specifications covering pipe installation required that "All valves necessary for safe and proper operation of the refrigerating system shall be included in the installation." Further, although the above statements meant that Tyler was not furnishing Virginia with certain valves, Virginia was still obligated to supply all valves. In fact, the specifications recognized that valves might not be part of the manufacturer's equipment; therefore, nothing in the invitation required that the valves be purchased from Tyler.

Accordingly, we must sustain the Virginia protest.

As regards the Koldaire bid, in the portion of the invitation where bidders were required to list the names of the manufacturers and model numbers for any equal products a bidder intended to supply, Koldaire listed "Tyler" as the manufacturer and "As specified" for the model numbers. While the using activity determined the Koldaire bid to be responsive due to the "As specified" language--we note the possible interpretation that Koldaire was promising to furnish only the Tyler brand name products specified in the specification and none

of the other brand names or other items requested. After bid opening and prior to award, the contracting activity did request Koldaire to clarify what items it would supply under the contract. By letter, Koldaire advised that it was bidding on all brand names. This request of, and acceptance of, the response from Koldaire was improper since, in our view, the Koldaire bid was at best ambiguous and, therefore, nonresponsive to the specification requirements. See Blazer Industries, Inc., B-194188, June 19, 1979, 79-1 CPD 440.

However, there is no remedial action that our Office could recommend. The contract was awarded on March 21, 1979, with delivery to be made within 120 days after the receipt of the written notice of award. Thus, at this time the contract has been substantially completed. We are by letter advising the Secretary of the Air Force of the deficiencies occurring in this procurement action.


Deputy Comptroller General
of the United States

*protest -
sustained*